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Supreme Court, U.S.
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No. 04-04-840

IN THE

Supreme Court of the United States

LYNN ALLAN JENKINS, I.,

Petitioner

v.

MTGLQ INVESTORS, a Delaware limited partnership; and John Does 1 Through 10,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States District Court has jurisdiction to void a state court's default judgment.

PARTIES TO THE PROCEEDING

All parties are listed on the title page.

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Petitioner respectfully petition for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Tenth Circuit opinion (App. A) is a non published decision entered on August 20, 2004 and its denial for rehearing entered on September 15, 2004. (App. B).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[Also Note infra: *In re: Stone Container Corporation* , 360 F.3d 1216.]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The First Amendment states in pertinent part:

> Congress shall make no law . . . abridging the freedom . . . to petition the government for a redress of grievance

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This a state court "quiet title" action commenced in the Second Judicial District, Davis County, state of Utah, April 11, 2003, the Honorable Michael G. Allphin, district court judge, presiding.

The state court entered its default judgment on September 4, 2003 and the respondent MTGLQ Investors L.P., a Delaware limited partnership, (MTGLQ)[1] filed the removal action to the federal court on December 12, 2003, claiming it had not been served with the summons and complaint and that it first discovered the default judgment on November 24, 2003.

A. Utah District Court Quiet Title Action:

The quiet title complaint is on file with the 2nd District Court and the Division of Corporations for the state of Utah,

---

[1] MTGLQ Investors is alleged to be a defunct Delaware limited partnership which was owned or controlled by Goldman Sachs & Company, a Delaware corporation, headquartered in New York City, New York through its then corporation MTGLQ Inc., acting as the managing partner on December 29, 1993 for MTGLQ Investors. March 24, 1995 MTGLQ Inc., formed MTGLQ II., L.P., ("MTGLQ II."). November 28, 1997, MLQ L.L.C., (it was formed November 24, 1997) merged with MTGLQ Inc., and MLQ, Inc. Then, MTGLQ Investors became the Limited Partner for MTGLQ II., with MLQ, L.L.C., becoming MTGLQ II.'s General Partner.

which states the facts of the state action against MTGLQ Investors, however the complaint is not included as an attachment since Utah has not been made a party to the removal action and petitioner lacks standing to represent the state of Utah.

B. Proceedings Below

MTGLQ Investors failed to file as a foreign limited partnership [endnote:[1]] in the state of Utah therefore the Director of the Utah Division of Corporations, Kathy Berg, was appointed its agent for service as provide by Utah Code Annotated: [endnote[2]]

> § 48-2a-907(4) A foreign limited partnership, by transacting business in this state without registration, appoints the director of the division as its agent for service of process with respect to claims for relief and causes of action arising out of the transaction of business in this state. [Amended by Chapter 189, 1991 General Session]

April 12, 2003 petitioner served the Director of the Division of Corporations, [endnote [3]] Kathy Berg, however, Judge Allphin determined that service [endnote [4]] was improper, therefore, on June 13, 2003, Ms. Berg was again served by a private investigator.

December 15, 2003 MTGLQ Investors filed its Notice of Removal in the Second Judicial District Court.

April 20, 2004 the United States District for Utah entered its final order, denying petitioner's motions to remand to state the court for lack of jurisdiction, "Plaintiff's Motion to Dismiss or Strike, filed December 17, 2003;" and

supplemented with "Plaintiff's Motion to Dismiss For Lack of Jurisdiction, filed February 3, 2004." Attached hereto as APPENDIX "C", is the April 20th order and the notification to the state court that: "IT IS FURTHER ORDERED that the Motion of Defendant MTGLQ Investors, L.P. to Set Aside Default Judgment is granted." which petitioner alleges to be the first time a state court's default judgment has been set aside by a federal district court removal action.[infra see: Kenman Engineering, v. City of Union; 314 F.3d 468, (10th Cir. 2002) in which the Tenth Circuit Court of Appeals determined it would not allow a federal district court to interfere with a state court judgment which it perceived to be unconstitutional and/or unfair to the judgment debtor also, *Crutchfield v. Countrywide Home Loans, et al.*, published November 24, 2004, Case No. 03-6311 that ". . . [b]y confining state cases to state appellate systems, the *Rocker-Feldman* doctrine preserves the state plaintiff's forum choice. More importantly, it respects the values of federalism implicit in our parallel system of independent state and federal courts, with the United States Supreme Court at the apex of both – a structure established by the first Judiciary Act of 1789 and adhered to ever since."]

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE TENTH CIRCUIT

The court's decision conflicts with the decision of the United States Supreme Court, in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714-15, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996); the appeals court's *In re: Stone Container Corporation*; and *Crutchfield*. The procedures outlined for an

appeal of final orders or "collateral orders" in a state court removal proceeding, is alleged to be the same procedures as outlined for remand order:

"To secure and maintain uniformity of decisions; also, the proceeding involves one or more questions of exceptional importance see: *Quackenbush* which determined:"

[4A]

> We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress. See, e. g., *Colorado River*, 424 U.S. at 821 ("Federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them'"); *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964) ("'When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction'") (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40, 53 L. Ed. 382, 29 S. Ct. 192 (1909)); *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821) (federal courts "have no more right to .... usurp that which is not [its jurisdiction]"). This duty is not, however, absolute. See *Canada Malting Co. v. Paterson S. S., Ltd.*, 285 U.S. 413, 422, 76 L. Ed. 837, 52 S. Ct. 413 (1932) ... for example where abstention is warranted by considerations of "proper constitutional adjudication," "regard for federal-state relations," or "wise judicial administration," *Colorado River*, supra, at 817 (internal quotation marks omitted).(emphasis added)

The *In re Stone Container Corp.* decision concerning appeals of an "collateral order" brings forth the need for this

petition to correct the conflict:

> . . . . [w]e have acknowledged the central point of *Quackenbush*, i.e., that a remand order may be reviewed under 28 U.S.C. § 1291 as a final order or as a collateral order because '[a] remand order puts the litigants "effectively out of court"' *First Union Mortgage Corp. v. Smith*, 229 F.3d 992, 994 (10th Cir. 2000) (quoting *Quackenbush*, 517 U.S. at 714 (further quotation omitted))"(emphasis added)

The *pro se*, appeal followed *In re: Stone Container Corp.* and now petitioner seeks the United States Supreme Court to order the Tenth Circuit to accept jurisdiction.

Additionally, petitioner believes, after his review of the statutory law with its case law concerning the removal action, there was no authorization by Congress that provides for removal from a state court judgment after its entry of a default judgment.[endnote [5]] Nor the ruling that service was void.

II. THE QUESTION PRESENTED IS IMPORTANT

June 21, 2004 the Court ruled in *Aetna Health Inc., Fka Aetna U. S. Healthcare Inc. et al. v. Davila* , (S.C. 2003, No. 02-1845) on Certiorari to the United States Court of Appeals for the Fifth Circuit at Opinion page 4:

> II A
>
> Under the removal statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant" to federal court. 28 U. S. C. §1441(a). One category of cases of which district

> courts have original jurisdiction are "federal question" cases: "arising under the Constitution, laws, or treaties of the United States." §1331. We face in these cases the issue whether respondents' causes of action arise under federal law.

"Ordinarily, determining whether a particular case arises under federal law turns on the well-pleaded com- [page 6] plaint rule. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 9 -- 10 (1983). The Court has explained that:"

> "whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute[,] . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U. S. 74, 75. 76 (1914).

"In particular, the existence of a federal defense normally does not create statutory 'arising under' jurisdiction, *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908), and 'a defendant may not [generally] remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law.' *Franchise Tax Bd.*, supra, at 10. There is an exception, however, to the well-pleaded complaint rule."

> "[W]hen a federal statute wholly displaces the state-law cause of action through complete pre-emption," the state claim can be removed. *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003). This is so because

> "[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Ibid.* .... (emphases added)

III THE DECISION OF THE COURT OF APPEALS HAS A PARTICULARLY DEBILITATING EFFECT ON THE UNIFORM (FOREIGN) PARTNERSHIP ACT.

The Uniform (Foreign) Partnership Act has been adopted by a large number of States similar to the code in Utah. The federal court's determination that Utah's law is unconstitutional would follow to the other States which have adopted the same provision [endnote[6]]. Also, Utah's long-arm statute, Utah Code Ann. § 78-27-24 [endnote[7]] is voidable under the service mandate of a foreign limited partnerships which allows the exemption of "doing business" from appointing an agent thus giving a factitious organization immunity from suit in the States which have adopted uniform laws, thus, making it impossible for a citizen's right to protect his property or petition for redress. See: the United States Supreme Court's benchmark decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). 477

> . . . jurisdictional rules may not be employed in such a way as to make litigation "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (re forum-selection provisions); *McGee v. International Life Insurance Co.*, supra, at 223-224.

The Utah Supreme Court stated in: *SII MegaDiamond, Inc., v. American Superabrasives Corp.*, 969 P.2d 430, 435 (Utah 1998),

> . . . "the public interest demands [that] the state provide its citizens with an effective means of redress against nonresident persons, who, through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection." Utah Code Ann. § 78-27-22.

And, then the Utah Court of Appeals: *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT APP 110; 2 P.3d 451-453

> . . . Our long-arm statute provides, in relevant part, that any person who transacts any business within this state "submits himself . . . to the jurisdiction of the courts of this state." Utah Code Ann. § 78-27-24 (Supp. 1999). "The words 'transaction of business within this state' mean activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah." Id. § 78-27-23 (1996). In enacting the long-arm statute, our legislature explicitly stated that the statute "should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution." *Id.* § 78-27-22.

II. ISSUES

There is no case law which would allow the removal doctrine prescribed by Judge Campbell's April 20, 2004 Order, which brings about the question; Whether the United States District Court has jurisdiction to void a state court's

default judgment? Then, (1) How must a party proceed after an order in a state court removal action is entered? or, (2) Is the proper approach being an appeal to the federal circuit court or, (3) a writ mandamus for the federal district court to do its duty?

The answers, petitioner believes, can be found in the Tenth's Circuit case law, *In re: Stone Container Corp.*, at [*5] listing the reasoning behind its acceptance of a 7th Circuit's decision:

> Appeal rather than mandamus is the right route. Although *Thermtron* stated that mandamus is essential and [*6] appeal impermissible, *Quackenbush* reversed that conclusion. 517 U.S. at 714-15. The Court [in *Quackenbush*] observed that the [mandamus requirement] of *Thermtron* had been based on [an earlier] decision the Justices now deem "superannuated." 517 U.S. at 715. A remand order terminates the litigation in federal court and therefore after *Quackenbush* is appealable as a "final decision" under 28 U.S.C. § 1291-unless § 1447(d) forecloses appeal . . . .*Benson*, 188 F.3d at 782.

It further noted,

> It appears that only the Fourth Circuit holds that mandamus is still appropriate. See *Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000). That court views *Thermtron* and *Quackenbush* as establishing alternative avenues for challenging a remand order. See *Borneman*, 213 F.3d at 826. The court did not explain how both an appeal and mandamus can be available, however, when the Supreme Court has repeatedly held that mandamus is

> not a substitute for an appeal, see, e.g., *Schlagenhauf v. Holder*, 379 U.S. 104, 110, 13 L. Ed. 2d 152, 85 S. Ct. 234 (1964), and that mandamus [*7] is not available when there is an "adequate alternative means" for petitioners to obtain the relief they seek, see, e.g., *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 309, 104 L. Ed. 2d 318, 109 S. Ct. 1814 (1989).

This petition for Certiorari presents a question of exceptional importance that the Tenth Circuit Court of Appeal has already instructed its district courts not to use the removal action statute to overturn a state court judgment it perceived to be unconstitutional or void. See: *Kenman Engineering, v. City of Union*; 314 F.3d 468-474, (10th Cir. 2002):

> Under 28 U.S.C. § 1257, "federal review of state court judgments can be obtained only in the United States Supreme Court." *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1169 (10th Cir. 1998) (citing *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 476, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983)). As a result, the *Rooker-Feldman* doctrine prohibits a lower federal court from considering claims actually decided by a state court, *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415-16, 68 L. Ed. 362, 44 S. Ct. 149 (1923), and claims "inextricably intertwined" with a prior state-court judgment. *Feldman*, 460 U.S. at 483 n.16.
>
> .... Although the Supreme Court has never decided the question, we have previously applied the *Rooker-Feldman* doctrine to judgments of intermediate state courts. See, e.g., *Facio v. Jones*, 929 F.2d 541, 542-43 (10th Cir. 1991) (applying

> *Rooker-Feldman* to the decision of an intermediate state-court judgment); *Anderson v. Colo.*, 793 F.2d 262, 263-64 (10th Cir. 1986) (same). Thus, in the Tenth Circuit, *Rooker-Feldman* applies to all state-court judgments, including those of intermediate state courts. Accord *Worldwide Church of God v. McNair*, 805 F.2d 888, 893 n.3 (9th Cir. 1986) ("The *Feldman* doctrine should apply to state judgments even though state court appeals are not final."); *Hale v. Harney*, 786 F.2d 688, 691 (5th Cir. 1986) ("We hold no warrant to review even final judgments of state courts, let alone those which may never take final effect because they remain subject to revision in the state appellate system."). (emphases added)

III. ARGUMENT

United States Court of Appeals for the Tenth Circuit has addressed the issues as presented above. Further, the panel's decision conflicts with several decisions of the United States Supreme Court to which the petition for rehearing, en banc, was denied (the citations to the conflicting cases are cited above) and consideration by the United States Supreme Court is therefore necessary to secure and maintain uniformity of its decisions and the requested writ involves several questions of exceptional importance, each of which has been concisely stated above; e.g., this petition asserts,

> *Rooker-Feldman* precludes 'a party losing in state court . . . from seeking what in substance would be appellate review of [a] state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.' *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994).

Judge Campbell's ruling disallows a Utah court quiet title action against a foreign limited partnership, not doing business in Utah, "a foreign limited partnership shall not be considered to be transacting business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities: ... (h) securing or collecting debts or enforcing any rights in property securing the same; ... (k) acquiring, in transactions outside this state or in interstate commerce, of conditional sale contracts or of debts secured by mortgages or liens on real or personal property in this state, collecting or adjusting of principal and interest payments thereon, enforcing or adjusting any rights in property provided for in the conditional sale contracts or securing the debts, taking any actions necessary to preserve and protect the interest of the conditional vendor in the property covered by the conditional sales contracts or the interest of the mortgagee or holder of the lien in the security, or any combination of such transactions." and as shown by the Utah Code citations or attached to the endnotes, her ruling closes Utah state courts.

Furthermore, the federal district court proceeding presents the questions of exceptional importance and involves issues on which the panel's decision conflicts with *Aetna Health Inc.*,

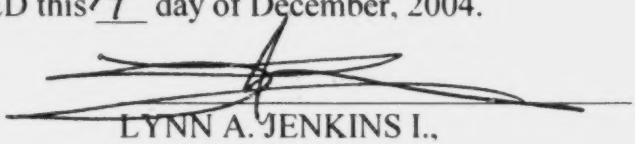
> ... '[W]hen a federal statute wholly displaces the state-law cause of action through complete pre-emption,' the state claim can be removed. *Beneficial Nat. Bank v. Anderson*, 539 U. S. 1, 8 (2003). This is so because '[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law,

Judge Campbell failed to realize, even with the federal diversity of citizenship the complaint must be accepted as legally served, thus making the default judgment outside federal jurisdiction.

CONCLUSION

WHEREFORE, the petitioner *pro se* requests the United States Supreme Court to grant the petition for Writ of Certiorari to the United States Tenth Circuit Court of Appeals, on the issue whether the United States District Court has jurisdiction to void a state court's default judgment as represented herein and for such other and further relief the Court deems proper in the premises.

DATED this 14th day of December, 2004.



LYNN A. JENKINS I.,
Petitioner, pro se

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LYNN ALLAN JENKINS, I,	:	
	:	
Plaintiff- Appellant,	:	
v.	:	No.04-4107
MTGLQ INVESTORS;	:	
JOHN DOES I Through 10,	:	
	:	
Defendants - Appellees.	:	

ORDER
Filed August 20, 2004

Before SEYMOUR, LUCERO and O'BRIEN Circuit Judges.

This court lacks jurisdiction over this appeal because the order being appealed is not final or otherwise immediately appealable.

The plaintiff appeals an order of the district court granting the defendant's motion to vacate default and denying the plaintiffs motion to dismiss.

This court has jurisdiction to review only final decisions, 28 U.S.C. § 1291, and specific types of interlocutory orders not applicable here. A final decision is one that disposes of all issues on the merits and leaves nothing for the court to do but execute the judgment. Van *Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988).

Appendix "A"

Accordingly, this appeal is DISMISSED. The mandate shall issue forthwith.

Entered for the Court
PATRICK FISHER, Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LYNN ALLAN JENKINS, I,	:	
	:	
Plaintiff- Appellant,	:	
v.	:	No.04-4107
MTGLQ INVESTORS;	:	
JOHN DOES I Through 10,	:	
	:	
Defendants - Appellees.	:	

ORDER
Filed September 15, 2004

Before SEYMOUR, LUCERO and O'BRIEN Circuit Judges.

Ordered petition for rehearing en banc denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

Appendix "B"

FILED
CLERK, U.S. DISTRICT COURT
2004 APR 20 P. 2:55
DISTRICT COURT UTAH
BY:_____
DEPUTY CLERK

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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH
CENTRAL DIVISION

LYNN ALLAN JENKINS I.,	:	
	:	**ORDER RE: PENDING**
Plaintiff,	:	**MOTIONS**
	:	
v.	:	Case No. 1:03-CV-00 148 TC
MTGLQ INVESTORS. L.P.,	:	
and JOHN DOES:	:	Honorable Tena Campbell
I THROUGH 10,	:	
	:	Magistrate Judge David 0.
Defendants	:	Nuffer

Appendix "C"

On March 31. 2004 a hearing was held before the Court on the following motions:

1. Plaintiff's Motion to Dismiss Or Strike, filed December 17, 2003;

2. Motion of Defendant MTGLQ Investors, L.P. to Set Aside Default Judgment, filed January 21. 2004: and

3. Plaintiff's Motion to Dismiss For Lack of Jurisdiction, filed February 3, 2004.

At the hearing the plaintiff, Lynn Allan Jenkins, I., appeared *pro se*. Defendant MTGLQ Investors. L.P. appeared through its counsel, George W. Pratt. of Jones, Waldo, Holbrook & McDonough.

The Court has reviewed and carefully considered all the papers filed in connection with the pending motions. It has aLso heard and considered the arguments and representations that were made at the time of the hearing. For reasons stated on the record at the conclusion of the hearing, the Court is of the opinion that plaintiff's motions should be denied, and defendant's motion should be granted.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion to Dismiss Or Strike is denied.

IT IS FURTHER ORDERED that the Motion of Defendant MTGLQ Investors, L.P. to Set Aside Default Judgment is granted.

IT IS FURTHER ORDERED that Plaintiff's Motion to Dismiss For Lack of Jurisdiction is denied.

IT IS FURTHER ORDERED that following entry of

this Order, MTGLQ Investors, L.P. shall have thirty days to answer or otherwise respond to plaintiff's Complaint.

DATED this 20 day of April, 2004.

/s/_____
Honorable Tena Campbell
United States District Court Judge

Approved as to form:
/s/_____
Lynn Allan Jenkins I.

/s/_____
George W. Pratt
Attorney for MTGLQ Investors, L.P.

ENDNOTES

1. § 48-2a-902. **Registration**.

(1) Before transacting business in this state, a foreign limited partnership shall register with the division. In order to register, a foreign limited partnership shall submit to the division on forms provided by the division a certificate of good standing or similar evidence of its organization and existence under the laws of the state in which it was formed, together with one original and one copy of an application for registration as a foreign limited partnership, signed under penalty of perjury by a general partner and setting forth:

(a) the name of the foreign limited partnership and, if that name is not available in this state, the name under which it proposes to register and transact business in this state;

(b) the state and date of its formation;

(c) the name and street address of an agent for service of process on the foreign limited partnership whom the foreign limited partnership elects to appoint; the agent must be an individual resident of this state, a domestic corporation, or a foreign corporation having a place of business in and authorized to do business in this state;

(d) a statement that the director of the division is appointed the agent of the foreign limited partnership for service of process if the agent has resigned, the agent's authority has been revoked, or the agent cannot be found or served with the exercise of reasonable diligence;

(e) the street address of the office required to be maintained in the state of its organization by the laws of that state or, if not so required, of the principal office of the foreign limited partnership;

(f) the name and business address of each general partner; and

(g) the street address of the office at which is kept a list of the names and addresses of the limited partners and their

capital contributions, together with an undertaking by the foreign limited partnership to keep those records until the foreign limited partnership's registration in this state is canceled or withdrawn.

(2) Without excluding other activities which may not constitute transacting business in this state, a foreign limited partnership shall not be considered to be transacting business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities:

(a) maintaining or defending any action or suit or any administrative or arbitration proceeding or effecting the settlement thereof or the settlement of claims or disputes;

(b) holding meetings of its general partners or limited partners or carrying on other activities concerning its internal affairs;

(c) maintaining bank accounts;

(d) maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities;

(e) effecting sales through independent contractors;

(f) soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts;

(g) creating evidences of debt, mortgages, or liens on real or personal property;

(h) securing or collecting debts or enforcing any rights in property securing the same;

(i) transacting any business in interstate commerce;

(j) conducting an isolated transaction completed within a period of 30 days and not in the course of a number of repeated transactions of like nature; or

(k) acquiring, in transactions outside this state or in

interstate commerce, of conditional sale contracts or of debts secured by mortgages or liens on real or personal property in this state, collecting or adjusting of principal and interest payments thereon, enforcing or adjusting any rights in property provided for in the conditional sale contracts or securing the debts, taking any actions necessary to preserve and protect the interest of the conditional vendor in the property covered by the conditional sales contracts or the interest of the mortgagee or holder of the lien in the security, or any combination of such transactions. [Amended by Chapter 5, 1991 General Session, Amended by Chapter 189, 1991 General Session]

2. § 48-2a-907. **Transaction of business without registration**.

(1) A foreign limited partnership transacting business in this state may not maintain any action, suit, or proceeding in any court of this state until it has registered in this state.

(2) The failure of a foreign limited partnership to register in this state does not impair the validity of any contract or act of the foreign limited partnership or prevent the foreign limited partnership from defending any action, suit, or proceeding in any court of this state.

(3) A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of the fact that the foreign limited partnership has transacted business in this state without registration or has otherwise become subject to the jurisdiction of the courts of this state.

(4) A foreign limited partnership, by transacting business in this state without registration, appoints the director of the division as its agent for service of process with respect to claims for relief and causes of action arising out of the transaction of business in this state. [Amended by Chapter 189, 1991 General Session]

3. § 48-2a-104.5. **Service of process**.

(1) (a) If the limited partnership does not meet the requirement of Section 48-2a-104 of maintaining a registered agent, or if the registered agent cannot with reasonable diligence be served, the limited partnership may be served by registered or certified mail, return receipt requested, addressed to the limited partnership at its principal place of business as designated by the latest certificate of limited partnership or certificate of amendment on file with the division.

(b) Service is perfected under this section at the earliest of:

(i) the date the limited partnership receives the process, notice, or demand;

(ii) the date shown on the return receipt, if signed on behalf of the limited partnership; or

(iii) five days after mailing.

(2) This section does not prescribe the only means, or necessarily the required means, of serving a limited partnership. [Enacted by Chapter 41, 1996 General Session]

4. § 78-40-13. **Judgment on default -- Court must require evidence -- Conclusiveness of judgment**.

When the summons has been served and the time for answering has expired, the court shall proceed to hear the cause as in other cases, and shall have jurisdiction to examine into and determine the legality of the plaintiff's title and of the title and claims of all the defendants and of all unknown persons, and to that end must not enter any judgment by default against unknown defendants, but must in all cases require evidence of plaintiff's title and possession and hear such evidence as may be offered respecting the claims and title of any of the defendants, and must thereafter enter judgment in accordance with the evidence and the law. The judgment shall be conclusive against all the persons named in the summons and complaint who have been served and

against all such unknown persons as stated in the complaint and summons who have been served by publication. [No Change Since 1953]

5. § 78-22-1.5. **Definitions -- Judgment recorded in Registry of Judgments**.

(1) For purposes of this section, "Registry of Judgments" means the index where a judgment shall be filed and searchable by the name of the judgment debtor through electronic means or by tangible document.

(2) On or after July 1, 1997, a judgment entered in a district court does not create a lien upon or affect the title to real property unless the judgment is filed in the Registry of Judgments of the office of the clerk of the district court of the county in which the property is located.

(3) (a) On or after July 1, 2002, except as provided in Subsection (3)(b), a judgment entered in a district court does not create a lien upon or affect the title to real property unless the judgment or an abstract of judgment is recorded in the office of the county recorder in which the real property of the judgment debtor is located.

(b) State agencies are exempt from the recording requirement of Subsection (3)(a).

(4) In addition to the requirements of Subsections (2) and (3)(a), any judgment that is filed in the Registry of Judgments on or after September 1, 1998, or any judgment or abstract of judgment that is recorded in the office of a county recorder after July 1, 2002, shall include:

(a) the information identifying the judgment debtor on the judgment or abstract of judgment; or

(b) a copy of the separate information statement of the judgment creditor that contains:

(i) the correct name and last-known address of each judgment debtor and the address at which each judgment debtor received service of process;

(ii) the name and address of the judgment creditor;

(iii) the amount of the judgment as filed in the Registry of Judgments;

(iv) if known, the judgment debtor's social security number, date of birth, and driver's license number if a natural person; and

(v) whether or not a stay of enforcement has been ordered by the court and the date the stay expires.

(5) For the information required in Subsection (4), the judgment creditor shall:

(a) provide the information on the separate information statement if known or available to the judgment creditor from its records, its attorney's records, or the court records in the action in which the judgement was entered; or

(b) state on the separate information statement that the information is unknown or unavailable.

(6) (a) Any judgment that requires payment of money and is entered in a district court on or after September 1, 1998, or any judgment or abstract of judgment recorded in the office of a county recorder after July 1, 2002, that does not include the debtor identifying information as required in Subsection (4) is not a lien until a separate information statement of the judgment creditor is recorded in the office of a county recorder in compliance with Subsections (4) and (5).

(b) The separate information statement of the judgment creditor referred to in Subsection (6)(a) shall include:

(i) the name of any judgment creditor, debtor, assignor, or assignee;

(ii) the date of recording; and

(iii) the entry number of the original judgment or abstract of judgment.

(7) A judgment that requires payment of money recorded on or after September 1, 1998, but prior to July 1, 2002, has as its priority the date of entry, except as to parties with actual or constructive knowledge of the judgment.

(8) A judgment or notice of judgment wrongfully filed against real property is subject to Title 38, Chapter 9, Wrongful Liens.Amended by Chapter 370, 2001 General Session, [Amended by Chapter 306, 2001 General Session]

6. SECTION 117. SERVICE OF PROCESS.

(a) An agent for service of process appointed by a limited partnership or foreign limited partnership is an agent of the limited partnership or foreign limited partnership for service of any process, notice, or demand required or permitted by law to be served upon the limited partnership or foreign limited partnership.

(b) If a limited partnership or foreign limited partnership does not appoint or maintain an agent for service of process in this State or the agent for service of process cannot with reasonable diligence be found at the agent's address, the [Secretary of State] is an agent of the limited partnership or foreign limited partnership upon whom process, notice, or demand may be served.

(c) Service of any process, notice, or demand on the [Secretary of State] may be made by delivering to and leaving with the [Secretary of State] duplicate copies of the process, notice, or demand. If a process, notice, or demand is served on the [Secretary of State], the [Secretary of State] shall forward one of the copies by registered or certified mail, return receipt requested, to the limited partnership or foreign limited partnership at its designated office.

(d) Service is effected under subsection (c) at the earliest of:

(1) the date the limited partnership or foreign limited partnership receives the process, notice, or demand;

(2) the date shown on the return receipt, if signed on behalf of the limited partnership or foreign limited partnership; or

(3) five days after the process, notice, or demand is deposited in the mail, if mailed postpaid and correctly addressed.

(e) The [Secretary of State] shall keep a record of each process, notice, and demand served pursuant to this section and record the time of, and the action taken regarding, the service.

(f) This section does not affect the right to serve process, notice, or demand in any other manner provided by law.

Comment

The Act's Overall Approach

The new Limited Partnership Act is a "stand alone" act, "de-linked" from both the original general partnership act ("UPA") and the Revised Uniform Partnership Act ("RUPA"). To be able to stand alone, the Limited Partnership incorporates many provisions from RUPA and some from the Uniform Limited Liability Company Act ("ULLCA"). As a result, the new Act is far longer and more complex than its immediate predecessor, the Revised Uniform Limited Partnership Act ("RULPA").

Source – ULLCA Section 111.

Requiring a foreign limited partnership to name an agent for service of process is a change from RULPA. See RULPA Section 902(3).

7. 78-27-24. Jurisdiction over nonresidents -- Acts submitting person to jurisdiction.

Any person, notwithstanding Section 16-10a-1501, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of

this state as to any claim arising out of or related to:

(1) the transaction of any business within this state;

(2) contracting to supply services or goods in this state;

(3) the causing of any injury within this state whether tortious or by breach of warranty;

(4) the ownership, use, or possession of any real estate situated in this state;

(5) contracting to insure any person, property, or risk located within this state at the time of contracting;

(6) with respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendant had no control; or

(7) the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78, Chapter 45a, to determine paternity for the purpose of establishing responsibility for child support.

Amended by Chapter 120, 1998 General Session

(2)

Supreme Court, U.S
FILED
JAN 19 2005
OFFICE OF THE CLERK

No. 04-840

In The Supreme Court of the United States

LYNN ALLAN JENKINS, I.,

Petitioner Pro Se,

v.

MTGLQ INVESTORS, L.P.,
a Delaware limited partnership,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

MTGLQ Investors, L.P. ("MTGLQ") is a limited partnership, whose general partner is MLQ, L.L.C., which holds a 1% interest in MTGLQ, and whose limited partner is The Goldman Sachs Group, Inc., which holds a 99% interest in MTGLQ. MLQ, L.L.C. is a limited liability company, whose members are Goldman Sachs Global Holdings L.L.C. and The Goldman Sachs Group, Inc. Goldman Sachs Global Holdings L.L.C. is a limited liability company whose members are The Goldman Sachs & Co. L.L.C. and The Goldman Sachs Group, Inc. The Goldman Sachs & Co. L.L.C. is a limited liability company whose member is The Goldman Sachs Group, Inc. The Goldman Sachs Group, Inc. is a publicly traded entity which, as indicated, owns more than a 10% interest in MTGLQ.

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JURISDICTIONAL STATEMENT

As discussed in Part I of the Argument below, this Court does not have jurisdiction pursuant to 28 U.S.C. § 1254, because this case is not "in" the court of appeals.

STATEMENT OF THE CASE

Petitioner Lynn Allan Jenkins, I. ("Jenkins") commenced this action (the "Action") by filing a *pro se* complaint in the Second Judicial District of Davis County, State of Utah. Jenkins never served the Complaint on respondent MTGLQ Investors, L.P. ("MTGLQ").

Instead, to effectuate service on MTGLQ, Jenkins served the Utah Division of Corporations and Commercial Code (the "Division"), pursuant to *Utah Code Ann.* § 48-2a-907(4). This statute authorizes a plaintiff to serve a foreign limited partnership that has not registered with the Division, but is "transacting business" in Utah, by serving the Division.

In fact, MTGLQ has never been "transacting business" in the state of Utah, as defined in *Utah Code Ann.* § 48-2a-902(2). Accordingly, service of MTGLQ by serving the Division was improper.

Because Jenkins never served MTGLQ, MTGLQ didn't know the Action had been filed, and Jenkins was able to obtain a default judgment, entered on September 4, 2003, for almost $2,000,000.

MTGLQ was completely unaware of the filing of the complaint or the entry of the judgment until November 24, 2003, when MTGLQ's legal counsel received a foreclosure

report which disclosed the judgment as a lien against certain real property.

Eighteen (18) days later MTGLQ timely filed its Notice of Removal of the Action, pursuant to 28 U.S.C. § 1441. A true and correct copy of the Notice of Removal (without exhibits) is attached hereto as Appendix A. As set forth in the Notice of Removal, the district court had original jurisdiction of the Action pursuant to 28 U.S.C. § 1332, in that: (1) plaintiff Jenkins is a resident of Davis County, Utah; (2) defendant MTGLQ was a limited partnership organized under the laws of Delaware, whose principal place of business was in New York; and (3) the matter in controversy exceeded the sum or value of $75,000.

Following removal to the U.S. District Court for the District of Utah, MTGLQ filed a motion to set aside the default judgment pursuant to Rule 60(b), Federal Rules of Civil Procedure, on the grounds that (1) the judgment was obtained by Jenkins' fraud on the court, and (2) since MTGLQ had not been served, the judgment is void.

Following removal Jenkins filed, first, a motion to dismiss or strike the removed Action, and then another similar motion, to dismiss for lack of jurisdiction. In both motions Jenkins contended that the removed Action should be dismissed for lack of jurisdiction.

Following a hearing on March 31, 2004, the district court entered its Order, granting MTGLQ's Rule 60(b) motion, and denying Jenkins' motions challenging the court's jurisdiction. A copy of the district court's Order is attached as Appendix "C" to Jenkins' Petition.

Jenkins' appeal to the Tenth Circuit Court of Appeals was dismissed *sua sponte*, "because the order being appealed is not final or otherwise immediately appealable." A copy of the Tenth Circuit's Order is attached as Appendix "A" to Jenkins' Petition. On September 15, 2004 the Tenth Circuit denied Jenkins' Petition for Rehearing *En Banc*. A copy of this Order is attached as Appendix "B" to Jenkins' Petition.

Jenkins then filed his Petition for a Writ of Certiorari with this Court.

ARGUMENT

I. THE COURT MAY NOT GRANT CERTIORARI BECAUSE THE CASE IS NOT "IN" THE COURT OF APPEALS.

Pursuant to 28 U.S.C. § 1254, only "[c]ases in the courts of appeals may be reviewed by the Supreme Court. . . ." As explained in *Moore's*:

> Whether a case is "in" the court of appeals depends on whether that court has jurisdiction of the case. If the court of appeals does not have jurisdiction of the case, the Supreme Court may not review it under 28 U.S.C. § 1254.
>
> The court of appeals has jurisdiction of a case if the district court has rendered a final, appealable order from which a timely appeal has been taken.

22 *Moore's Federal Practice* § 405.03[1][a], p. 405-7 (3rd ed. 2004).

In this case Jenkins appealed from the district court's Order (1) setting aside the default judgment, and (2) denying Jenkins' motions to dismiss for lack of jurisdiction. Accordingly, the Tenth Circuit dismissed Jenkins' appeal *sua sponte*, "because the order being appealed is not final or otherwise immediately appealable." That left the merits of Jenkins' complaint to be addressed in the district court.

The Tenth Circuit's dismissal of Jenkins' appeal due to the lack of a final order is clearly correct. The denial of a motion to dismiss for lack of jurisdiction is not a final order, and therefore is not appealable. *See, e.g., Hill v. City of New York*, 45 F.3d 653, 659 (2nd Cir. 1995) ("[A] denial of a motion to dismiss is ordinarily considered nonfinal, and therefore not immediately appealable."). Even if Jenkins' motions for dismissal were treated liberally as motions for remand, orders denying remand are also not final, for purposes of appeal. *See, e.g., Huffman v. Saul Holdings Ltd. P'ship,* 194 F.3d 1072, 1076 (10th Cir. 1999).

Likewise, the portion of the district court's Order granting MTGLQ's Rule 60(b) motion is not appealable:

> [I]f the district court grants a motion under Rule 60 and orders a new trial or other further proceedings, the order is generally not appealable. An exception to this rule has been recognized, and the appeal allowed, when the district court was without jurisdiction to enter the order.

19 *Moore's Federal Practice* § 202.14[1][a], p. 202-73 (3rd ed. 2004). As discussed in Part II below, the district court clearly did have diversity jurisdiction, following removal, to rule on the motions presented to it. Therefore, the above-stated exception does not apply, and the Court's Order granting MTGLQ's Rule 60(b) motion is nonfinal,

and not appealable. *See, e.g., Jones & Guerrero Co. v. Sealift Pacific, Inc.*, 650 F.2d 1072, 1073 (9th Cir. 1981) (order vacating prior order of dismissal not appealable).

II. PETITIONER PRESENTS NO REASON TO GRANT CERTIORARI.

Even if the Petition were not fatally defective because this case is not "in" the court of appeals, Jenkins nonetheless presents no reason to grant the Petition.

Under Rule 10, certiorari is granted only to review a decision of a United States court of appeals. The only decision of the Tenth Circuit in this case is that Jenkins' appeal to it must be dismissed for lack of appellate jurisdiction. Since this ruling was clearly correct, the decision of the court of appeals presents no issue meriting the attention of this Court.

In his Petition Jenkins does not even address the correctness of the Tenth Circuit's dismissal for lack of jurisdiction. Instead, he challenges issues that have only been addressed by the district court: specifically, as stated in his Petition: "Whether the United States District Court has jurisdiction to void a state court's default judgment." Petition, p. i. (More accurately, MTGLQ believes that a proper statement of the issue would be: "Whether, following the entry of a state court default judgment and removal to the district court, the district court has authority to set aside the default judgment pursuant to Rule 60(b), Federal Rules of Civil Procedure.")

As indicated, this issue was not considered by the Tenth Circuit. Therefore, applying the criteria in Rule 10, this Court should decline to address the issue. *See, e.g.,*

NCAA v. Smith, 526 U.S. 459 (1999) (declining to decide in first instance issues that were not decided by court of appeals).

Even assuming, however, that the issue raised in the Petition had been fully addressed by the court of appeals, this case still would not satisfy Rule 10's criteria for granting certiorari. In the Petition Jenkins questions both the jurisdiction of the district court, and its authority to vacate the default judgment pursuant to Rule 60(b). But in advancing these positions Jenkins fails to articulate any reason to grant certiorari.

To begin with, the Court clearly acquired jurisdiction of this Action upon timely removal to the district court. As set forth in the Notice of Removal (Appendix A hereto), the plaintiff and defendant have diverse citizenship, and the amount in controversy is in excess of $75,000, thus satisfying the requirements for diversity jurisdiction under 28 U.S.C. § 1332(a).

After the Notice was filed, "the federal court [took] the case on removal exactly as the case stood in state court." 16 *Moore's Federal Practice*, § 107.31[3], p. 107-182.8 (3rd ed. 2004). Accordingly, the district court could properly entertain MTGLQ's motion to set aside the default judgment, pursuant to Rule 60(b):

> The general rule that a Rule 60(b) motion must be made in the court in which the judgment was rendered has no application to judgments rendered in state courts when the proceedings are subsequently removed to federal court. Once an action is removed to federal court, the district court to which the action is removed may consider a Rule 60(b) motion, even if it attacks a judgment initially rendered in state court.

12 *Moore's Federal Practice*, § 60.60[3][a], p. 60-191 (3rd ed. 2003).

The foregoing legal principles are well established. Jenkins has not directed the Court's attention to any conflict in the decisions of the lower federal courts, to any "important question of federal law" meriting this Court's attention, or to any "depart[ure] from the accepted and usual course of judicial proceedings," that could possibly merit granting Jenkins' Petition.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 19th day of January, 2005.

Respectfully submitted,

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

LYNN ALLAN JENKINS I, Plaintiff, v. MTGLQ INVESTORS, L.P., and JOHN DOES 1 THROUGH 10, Defendants.	**NOTICE OF REMOVAL** **Judge Dale A. Kimball** **DECK TYPE: Civil** **DATE STAMP: 12/12/2003 @15:51:23** **CASE NUMBER: 1:03CV00148 DAK**

(Filed Dec. 12, 2003)

MTGLQ Investors, L.P. ("MTGLQ") hereby provides notice of the removal of this civil action, filed in the Second Judicial District Court of Davis County, State of Utah, to the United States District Court for the District of Utah. In connection with this removal, MTGLQ respectfully represents as follows:

1. On or about April 11, 2003 an action was commenced against MTGLQ by the filing of a Complaint in the

Second Judicial District Court of Davis County, State of Utah, styled *Lynn Allan Jenkins I v. MTGLQ Investors, L.P., et al.*, Civil No. 030700197 (the "Action"). A copy of the Complaint is attached hereto as Exhibit A.

2. The Complaint has never been served on MTGLQ, nor has MTGLQ ever been served with a Summons in connection with the Action.

3. Indeed, MTGLQ was completely unaware of the Action until November 24, 2003, when MTGLQ's legal counsel received a Foreclosure Report with respect to certain real property collateral held by MTGLQ located in Davis County. A true and correct copy of this Certified Foreclosure Report is attached hereto as Exhibit B.

4. As reflected in Schedule B to the Foreclosure Report, a Judgment, taken by default, was entered in the Action on September 4, 2003, in favor of plaintiff Lynn Allan Jenkins I. ("Jenkins"), against MTGLQ. A true and correct copy of this Judgment is attached hereto as Exhibit C.

5. This Action is a civil action of which the Court has original jurisdiction under 28 U.S.C. § 1332, which may be removed to this Court pursuant to 28 U.S.C. § 1441, in that:

a. Plaintiff Jenkins is a resident of Davis County, Utah, and a citizen of the State of Utah;

b. Defendant MTGLQ is a limited partnership organized under the laws of the State of Delaware, whose principal place of business is in New York, New York, and

c. The matter in controversy in this action exceeds the sum or value of $75,000, exclusive of interest and costs.

DATED this 12th day of December, 2003.

JONES, WALDO, HOLBROOK
& McDONOUGH

By /s/ George Pratt
George W. Pratt
Attorneys for MTGLQ
Investors, L.P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of December, 2003, I caused a true and correct copy of the foregoing NOTICE OF REMOVAL to be served, by first class mail, postage prepaid, on the following:

Lynn A. Jenkins I
3 East 2750 South
Bountiful, UT 84010

/s/ George Pratt